IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' SUPPLEMENTAL TRIAL BRIEF REGARDING INADMISSIBLE PRIOR HEARSAY STATEMENTS OF A TESTIFYING WITNESS

It appears that the State will seek to admit into evidence exhibits and testimony containing the inadmissible prior out-of-court statements and writings of testifying witnesses. Accordingly, Defendants respectfully submit the enclosed discussion regarding the inadmissibility of such prior hearsay statements under Federal Rules of Evidence 801 and 802.

DISCUSSION

Under the Federal Rules of Evidence, out-of-court statements are not admissible simply because the person who spoke or wrote the out-of-court hearsay is testifying. Federal Rule of Evidence 802 states that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R. Evid. 802. "The traditional view has been that a prior statement, *even one made by the witness*, is hearsay if it is offered to prove the matters asserted therein," and thus a prior statement by the witness is "admissible as substantive evidence to prove the matter asserted therein *only* when falling within an established exception to the hearsay rule." 2 McCormick on Evidence § 251 (emphasis added).

This traditional view has been expressly adopted by the Federal Rules of Evidence. In fact, the Federal Rules provide only three exceptions that allow the use of out-of-court statements because the out-of-court declarant is now a testifying witness:

> (c) Hearsay. "Hearsay" is a statement, other than one made *by the declarant while testifying at the trial or hearing*, offered in evidence to prove the truth of the matter asserted.
>
> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> > (1) *Prior statement by witness*. The declarant *testifies at the trial or hearing* and is subject to cross-examination concerning the statement, *and* the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.

Fed. R. Evid. 801(c), (d) (emphasis added); *see* Weinstein's Federal Evidence § 801.02[2] ("Rule 801 expressly excludes three types of prior statements by witnesses that would otherwise be covered by the definition of hearsay…."). In other words, the fact that an out-of-court declarant has become a testifying witness does not provide authorization to admit (either orally or through exhibits) the out-of-court statements of that witness. Rather, the three clauses of subsection (d)(1) provide that such out-of-court statements may be used only to (A) impeach; (B) rebut "an express or implied charge … of recent fabrication"; or (C) identify a person. Fed. R. Evid. 801(d)(1).

The scope of this rule is further confirmed by the advisory committee notes, which state:

> The position taken by the Advisory Committee in formulating this part of the rule is founded upon *an unwillingness to countenance the general use of prior prepared statements as substantive evidence*, but with a recognition that *particular circumstances call for a contrary result*. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates *three situations in which the statement is excepted from the category of hearsay*.

Fed. R. Evid. 801 advisory comm. notes to subdivision (d) (1972) (emphasis added).[1] Accordingly, the prior out-of-court statements or writings of a testifying witness are inadmissible hearsay, and may be admitted as substantive evidence for the truth of the matter asserted *only* upon satisfaction of a specific hearsay exception under Rule 801(d)(1) or another provision of the Federal Rules.

This prohibition against admission of testifying witnesses' prior out-of-court statements and writings applies equally to fact witnesses and retained or non-retained experts. *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994) ("Rule 702 permits the admission of expert opinion testimony not opinions contained in documents prepared out of court. Rule 703 allows a testifying expert to rely on materials, including inadmissible hearsay, in forming the basis of his opinion. Rules 702 and 703 do not, however, permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible.").[2] In the most commonly referenced example, courts have uniformly rejected admission of reports authored by retained or non-retained experts, as either exhibits or quoted testimony in the record, unless the report is subject to an exception under the Federal Rules of Evidence. *See, e.g., Thakore v. Universal Mach. Co. of Pottstown*, 2009 U.S. Dist. LEXIS 88895, *48-49 (N.D. Ill. Sept. 25, 2009) ("expert reports under Rule 26 are not

[1] Notably, prior to the adoption of Federal Rule of Evidence 801(d), disagreement existed as to the admissibility of a prior statement by a witness. *See* 2 McCormick on Evidence § 251; *Martin v. United States*, 528 F.2d 1157, 1158-61 (4th Cir. 1975) ("[D]espite the criticism of some of the commentators, the courts have justifiably and steadfastly refused to admit such statements as substantive evidence."). In enactment of Rule 801(d), the Advisory Committee on Federal Rules of Evidence "adopted an intermediate position," only "exempting from classification as hearsay certain prior statements thought by circumstances to be generally free from danger of abuse." 2 McCormick on Evidence § 251; *see* Weinstein's Federal Evidence §§ 801.02[2], 801.20-23.

[2] The admissibility of documents relied upon in the course of expert testimony is separately addressed in *Defendants' Supplemental Brief Regarding Inability of Experts to Offer Inadmissible Facts as Opinion Evidence*, Dkt. No. 2684 (Oct. 12, 2009).

independently admissible") (collecting cases); *Dortch v. Fowler*, 2007 U.S. Dist. LEXIS 41615, *1-8 (W.D. Ky. June 6, 2007) (admitting report authored by non-retained expert witness only after Rule 803(8)(C) analysis).

Based on prior indications from the State of Oklahoma, Defendants anticipate that this issue will arise in the context of retained and non-retained experts, as well as certain fact witnesses.[3] In each instance, the Federal Rules require that prior out-of-court statements by a testifying witness—including any written letters, emails, reports or articles authored by that witness—must satisfy a specific hearsay exception prior to admission into evidence as an exhibit or quoted testimony. Absent satisfaction of a specific hearsay exception, these out-of-court statements are inadmissible under the Federal Rules.

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[3] For example, in a prior 72-hour disclosure the State of Oklahoma designated Ok. Ex. 5693 for use during the testimony of Michael Smolen, who is listed as an author of that document. On two occasions during the direct testimony of Shanon Phillips, the Court denied admission of this exhibit pursuant to the State's failure to satisfy the hearsay exception in Rule 803(8)(C). *See* Oct. 7, 2009 Trial Tr. Vol. XI at 1276:4-1285:6 (Dkt. No. 2691); Oct. 7, 2009 Trial Tr. Vol. XII at 1340:20-1350:3 (Dkt. No. 2692). As detailed herein, the mere fact that Mr. Smolen may appear as a witness does not change the analysis of the admissibility of this prior out-of-court statement under the hearsay rule. *See* Fed. R. Evid. 801(d); *supra* at 1-4.

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